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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 12

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY, *Respondent.*

PETITION FOR REHEARING

HARRY A. POTH, JR.,
REID & PRIEST
910 17th St., N. W.
Washington 6, D. C.
A. C. INMAN
1220 Idaho Street
Boise, Idaho

JAMES E. O'BOYLE
FRANCIS H. CASKIN
REID & PRIEST
910 17th St., N. W.
Washington 6, D. C.
Of Counsel.

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Idaho Power Company prays that the Court grant rehearing of its decision and judgment of November 10, 1952 reversing the judgment of the Court of Appeals for the District of Columbia.

REASONS FOR GRANTING A REHEARING

I. Idaho Power Company respectfully submits that such decision misinterpreted the intent of Congress in enacting the Public Utility Act of 1935. It is our contention that the legislature inserted Section 201(f) in the statute specifically to protect all "public utilities" subject to the Federal Power Act regardless of whether or not they are also "licensees" under Part I. As the facts show, Idaho is both a "licensee", and a "public utility" under Part II

of the Act (R. 30). Moreover, the Federal Power Commission has specifically determined that it is a "public utility" under the Act, 1 FPC 696, 697 (1937).

In support of this contention, we submit, first, the affidavit, annexed hereto as Appendix A, of the Honorable Charles A. Wolverton, Representative in the Congress from the State of New Jersey and senior member of the House Committee on Interstate and Foreign Commerce. As such affidavit, as well as the opinion of the court below and the Brief and Supplemental Memorandum submitted by the Commission in this Court, indicates, Congressman Wolverton took the leading role in the discussions in those parts of the hearings before the House Committee relating to the precise issue here.

This affidavit refutes the contentions made in the Commission's brief that the addition of Part II to the Act had no effect upon the Commission's power to condition licenses. Specifically it makes clear that the interrogation, by Mr. Wolverton, of Mr. Dozier DeVane, the Solicitor of the Federal Power Commission at the time of the 1935 amendments, was directed to the Wheeler-Rayburn bill as a whole, and not merely to Part II of the Act (Commission's brief pp. 42-44). Hence, it seems clear that the intent of the draftsmen of the bill was to prevent the forced interconnection of the facilities of *any* privately owned electric utility company with those of the federal government or of any state or municipality.

Such affidavit further establishes that Congress was very careful to integrate the provisions of the old Federal Water Power Act as a component of the new statute and made sure, by substituting the word "Part" for the word "Act" in Sections 6 and 10(g), that licenses issued under that Part must be "in conformity" and "not inconsistent" with the provisions of the "Act" as a whole, including the limitation on the powers of the Commission contained in Section 201(f).

Most importantly it shows that Congress did not intend to create one type of regulatory authority over electric

companies that were both "public utilities" and "licensees" under the Act, and another type of regulatory authority over companies that were solely "public utilities" under Part II, with respect to this highly controversial and much discussed aspect of the Wheeler-Rayburn bill involving the interconnection of the facilities of such companies with those of other persons. It therefore follows that a company, such as Idaho, which is also a "public utility" under the Act and subject to regulation under Part II of the Act is also entitled to the benefits of the safeguards provided by that Part in Section 201(f).

This contention is further reinforced by that part of the Senate Report on the Wheeler-Rayburn bill (S. Rep. No. 621, 74th Cong., 1st Sess.) which was overlooked by the Commission in its brief. In the government's brief (p. 45) reference is made to page 19 of such Report which explains in general terms the purpose of Section 201(f). But the brief fails to mention the further explanation of this Section in that part of the Report analyzing the substitute bill, section by section. At p. 49 the Senate Report states:

> "Subsection (e) [which became Section 201(f) on final enactment] expressly excludes from the operation of the *Act* the United States, the States, municipalities, and all of their agencies. It is designed to make perfectly clear that no compulsory powers may be exerted upon public projects or upon privately owned *projects** for the benefit of public plants."

This quotation speaks specifically in terms of the *Act* as a whole, and of public and privately owned *projects*, not merely of "private utilities" (*id.* p. 19).

The word "project" is a technical term and appears only in Part I of the Act, where it is defined in Section 3(11). It would seem evident that the Senate Report recognized that the important things to be protected from forced interconnection with facilities of the government were the

* Emphasis supplied throughout unless otherwise indicated.

hydroelectric projects of private companies, and "the primary line or lines transmitting power therefrom" (Sec. 3(11)), subject to the licensing authority of the Commission under Part I.

It is respectfully submitted that, regardless of what the scope of the Commission's authority to impose license conditions was under the old Water Power Act, it cannot today contravene the prohibitions of Section 201(f) in conditioning a license issued to a company, such as Idaho, which is also a "public utility" under Part II of the present statute.

Such a conclusion is also entirely in accord with the recent decision of this Court in *Pennsylvania Water Power Company* v. *Federal Power Commission*, 72 S. Ct. 843, 845 (1952), where it was held that:

> "Although Penn Water is the type of 'public utility' subject to regulation under Part II of the Act, it argues that since it is subject to regulation under Part I as a licensee it cannot be regulated under Part II as a public utility. We cannot agree. With some express exceptions not here relevant the language of Part II of the Act makes all public utilities subject to the regulation it prescribes * * * ."

Consequently, with respect to Idaho there was no necessity for the Court to find authority for interconnection in the general provisions of Sections 4(g) and 10(a) of Part I. The authority to require "interconnections" is established specifically in Section 202(b) of Part II. *However, such authority for interconnection is expressly limited in Section 201(f), and the federal government is prohibited from attempting to utilize that authority in its behalf.*

II. Secondly, we wish to bring to this Court's attention certain aspects of the legislative history of Sections 4(g) and 10(a) of Part I of the Act. This legislative history has not been previously discussed and has only now become significant in the light of this Court's decision of November 10th, and indicates that Congress never intended to authorize the Commission to require, under Part I, the forced

interconnection of private transmission facilities with those of the Government.

This Court's opinion states that Part I of the Act is the source of the Commission's authority to condition licenses. From that premise it follows that whatever powers the Congress granted to the Commission in this respect must be ascertained from the legislative history of the former Federal Water Power Act of 1920 (41 Stat. 1063), which became Part I of the present Act.

The legislative history of Section 10(a), which makes no reference to the public lands but solely to "waterways", is illuminating. In the *Hearings before the House Committee on Water Power,* (65th Cong., 2nd Sess., 1918), Mr. O. C. Merrill, the representative of the Secretary of Agriculture in drafting the final bill, and thereafter, and for many years, the Secretary of the Federal Power Commission, described Section 10(a) as follows (p. 62):

> "Section 10 prescribes the general conditions which shall be put in all licenses, *whether on public lands* or on navigable rivers. The first provision is that the project shall be such as will make a comprehensive scheme of development *of the stream or the section of the stream to which the license is to apply.* I think it is extremely important that that should be carried out strictly in the administration of the bill, because the chief concern of the Government is to secure the most *complete development of the power* that is practicable or possible."

And again at pages 96 and 97:

> "Not only should the scheme of development be considered in relation to irrigation and to navigation and to water power, but also to flood control. There will be many projects in different parts of the United States where flood control is concerned, and where it should be within the power of the Commission to require structures, reservoirs, etc., to be built in such manner or used in such manner that they may be of benefit in flood control as well as in irrigation, navigation, and water-power development."

It therefore follows that securing the utmost development of the *water* in a *particular stream, or in a particular section thereof*, is the criterion for issuing a particular license. The "scheme of development" in no way relates to the transmission of power from other projects located in *other* streams, or in other sections of the same stream, over the transmission-lines leading from the particular hydro project. There is thus made clear the sharp distinction, throughout the entire original statute, between the development of the Nation's water resources and the mere ancillary use of such public lands as may be crossed by the transmission lines carrying the final product to the market place. The Commission's task is to develop and conserve water power, not the vast tracts of barren, and largely unusable, public lands in the West.

Turning to Section 4(g) it should be noted that this Section of the Act did not come into existence until the 1935 amendments and therefore could not have been an *original* source of licensing power to the Commission. Nowhere below did the Commission purport to rely on this section as authority for the imposition of conditions in the license. Nor could it have properly done so because the legislative history of this added subsection makes clear that it is solely procedural in nature. The Senate Report (No. 621, 74th Cong., 1st Sess., 1935) states at page 43:

> "A new subsection (g) is added to section 4 to authorize the Commission to investigate the occupancy of power sites on waters under its jurisdiction, and to issue appropriate orders to preserve its authority *over the navigable waters entrusted to its care.* This subsection would enable the Commission to conduct its own investigations instead of waiting for matters to be brought formally to its notice, and to proceed directly to prevent violations, instead of having to call upon the War Department or the Attorney General to take action."

And again a few lines up in the same page, referring to Section 4 as a whole the Report states:

"The provisions for the issuance of licenses on public lands and for the utilization of surplus power of Government dams are left unchanged."

It is therefore respectfully submitted that, in light of this legislative history, Sections 4(g) and 10(a) did not confer any general authority or guardianship upon the Commission over the "public lands", as contrasted with waterways and water resources.

The source of the Commission's authority therefore must be found, if any place, in the specific licensing sections of the Federal Water Power Act, and not in any general or inherent power over the public lands. The licensing sections are 4(e), 6 and 10(g). Section 4(e) authorizes the imposition of conditions "for the adequate protection and utilization" of any reservation affected by a particular project. The only "reservations" affected here are 27.4 miles of right-of-way across reclamation withdrawals, out of a total of 189 miles. It is patent that the "wheeling" of government power has no reasonable relation to the "protection and utilization" of such reservations.

All that is left is the general authority of Sections 6 and 10(g) permitting the imposition of conditions "in conformity" and "not inconsistent" with the Act. Without reciting a catalogue of possible consistent conditions, it would seem clear that the imposition of the duty of a common carrier, or a carrier of government power, is totally inconsistent with the basic concept behind the enactment of the original Federal Water Power Act—that electric utilities subject thereto were *not* to be made common carriers. As we pointed out in our brief (pp. 38-40) the amendment proposed by Representative Mays expressly constituting transmission line licensees as "common carriers",[1] was defeated.

Further, in Section 16 of the Act, the rights of the Government to take possession of, and to use "any project,

[1] "That all *transmission lines* constructed or operated under authority of this act shall be constructed, operated, and maintained as *common carriers*." (58 Cong. Rec., 66th Cong., 1st Sess., (1919) p. 2136.)

or part thereof," were specifically dealt with and provided for, but under conditions specifically set forth in the Act.[2] These provisions, coupled with the defeat of the Mays amendment, make it clear that the powers here contended for were *openly before the Congress, directly considered, and withheld.*

Equally indicative of the contemporaneous intent of Congress is the history of the Mineral Leasing Act of February 25, 1920, as amended August 21, 1935, (41 Stat. 449, c. 85, sec. 28; 30 U. S. C., sec. 185). This statute is in many respects a twin to the Federal Power Act. Both deal with related subjects involving the use of the public lands and resources, both were passed in 1920, both were amended in 1935, and the Mineral Leasing Act preceded the Federal Power Act both in original passage and in the later amendment.

The Mineral Leasing Act (as adopted in 1920) provided for rights of way for pipe lines, but—"upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers." This language is almost identical with that proposed in the Mays amendment, which the House shortly thereafter defeated and rejected for inclusion in the Federal Water Power Act of 1920.

But even though the carrier principle was adopted in the Mineral Leasing Act in 1920, Congress obviously did not intend or construe this to require the transportation of oil or gas from *government* fields, because—*a few days prior to the 1935 amendments* to the Federal Power Act,—the Mineral Leasing Act was also amended to include another specific condition, that such pipe lines—

> "shall accept, convey, transport * * * without discrimination, oil or natural gas produced from government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may * * * determine to be reasonable."

[2] As this court stated in *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107 (1944): "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment' ".

It is thus evident that Congress, in 1920, did not intend that pipe lines or transmission lines crossing the public domain be required to carry oil, natural gas or electricity produced from Government sources, nor, in the case of electric utilities, to make them common carriers.

We therefore respectfully submit that, in the language of *Williamson v. United States*, 207 U. S. 425, 461 (1908), a party cannot be "compelled to do that * * * which the act of Congress must be considered as having expressly excluded", and that administrative action taken "to achieve that which Congress refused to enact into law cannot be sustained", *Colgate-Palm Olive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 364 (1949).

CONCLUSION

For the reasons set forth above and in our brief and argument, it is respectfully urged that rehearing be granted and that, upon such hearing, the judgment of the Court of Appeals be reversed only to the extent that it affirmed the Commission's order as modified, and that the cause be remanded to the Federal Power Commission for entry of an order in accordance with the opinion of the Court below.

Respectfully submitted,

HARRY A. POTH, JR.,
REID & PRIEST.
910 17th St., N. W.
Washington 6, D. C.
A. C. INMAN
1220 Idaho Street
Boise, Idaho

JAMES E. O'BOYLE
FRANCIS H. CASKIN
Of Counsel.

Certification of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

HARRY A. POTH, JR.
Counsel for Idaho Power Company

APPENDIX A

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } ss:

CHARLES A. WOLVERTON, being duly sworn, deposes and says:

That I reside at Merchantville, New Jersey;

That I am, and have been since November 1926, a representative in The Congress of the United States from the State of New Jersey;

That I am, and have been since 1933, a member of the Committee on Interstate and Foreign Commerce of the House of Representatives and was a member thereof in the year 1935, when that Committee considered and passed upon the Public Utility Act of 1935, including the amendments to the Federal Water Power Act of 1920;

That during the hearings on the House Bill (H.R. 5423, 74th Cong., 1st Sess.), which, combined with the Senate Bill, after conference, became the Public Utility Act of 1935, I interrogated Mr. Dozier DeVane, then Solicitor of the Federal Power Commission and who had participated in the drafting of the bill, as to the intent of the draftsmen to require the interconnection of the transmission lines of private companies with those of the Government;

That my questions to Mr. DeVane, during such hearings, made no distinction between electric "public utility" companies, as defined in Part II of the Federal Power Act, and private electric utility companies in general (Hearings before the House of Representatives Committee on Interstate and Foreign Commerce on H.R. 5423, pp. 514-515);

That it was at that time and still is my understanding that the references in my questioning of Mr. DeVane to "this bill" was to the House Bill as a whole and not merely to Title II of Title II of the Bill, which Title is now Parts II and III of the Federal Power Act. There is no doubt at all in my mind as to this;

That I am also familiar with the specific amendments to what is now Part I of the Act and the fact that in some twelve different places in such Part I the word "Act" was changed to the word "Part", and that it is my recollection and opinion that the purpose of these changes was to relate and integrate what is now Part I with the other Parts of the present Act so as to eliminate any doubt that the Federal Power Act is a single instrument and not three separate statutes;

That as a member of the House Committee on Interstate and Foreign Commerce it was and still is my opinion that it was not the intent of Congress to give the Federal Power Commission one type of regulatory authority over electric companies that were both "public utilities" and "licensees" under the Act, and another type of regulatory authority over companies that were solely "public utilities" under Part II with respect to the interconnection of their facilities with those of other persons.

/s/ CHARLES A. WOLVERTON

Subscribed and sworn to before me this 2nd day of December, 1952.

/s/ DORA E. ROSE,
Notary Public of N. J.

(Seal)

Comm. exp. Aug. 25, 1957.